

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|                       |   |              |
|-----------------------|---|--------------|
| LINDA SONDESKY,       | : |              |
| Plaintiff,            | : | CIVIL ACTION |
|                       | : | No. 17-4280  |
| v.                    | : |              |
|                       | : |              |
| STEPHEN EDWARD ELLIS, | : |              |
| Defendant.            | : |              |

**ORDER**

**AND NOW**, this \_30th\_ day of January 2018, upon consideration of Defendant Ellis’ Motion to Dismiss (ECF No. 3), is it **ORDERED** that:

- With respect to Counts I and II, Defendant’s Motion is **DENIED** without prejudice to raise the issues at a later stage of litigation.<sup>1</sup>

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<sup>1</sup> For Count I, Plaintiff Sondesky alleges a claim for Fair Labor Standards Act (FLSA) retaliation. To allege an FLSA retaliation claim, a plaintiff must show that (1) she engaged in protected activity; (2) she suffered an adverse employment decision; and (3) the adverse decision was causally related to the protected activity. *See Conoshenti v. Public Elec. & Gas Co.*, 364 F.3d 135, 146–47 (3d Cir. 2004) (discussing the standard for FMLA retaliation).

Ellis argues that there was no adverse employment action because Sondesky was no longer an employee when the e-mail—the alleged retaliatory action—was sent to one of Sondesky’s prior employers. However, former employees can bring FLSA retaliation claims, and “[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.” *See Darveau v. Detecon, Inc.*, 515 F.3d 334, 341-42 (4th Cir. 2008) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)). “Former employees require such protection because they often need references from past employers . . . .” *Id.* at 343. Here, the e-mail to Sondesky’s former employer could negatively affect her ability to get a reference from that employer. Therefore, Ellis’ argument fails.

For Count II, Sondesky alleges defamation based on Ellis’ e-mail. Ellis first argues that the defamation claim fails because the e-mail was not capable of defamatory meaning. Sondesky alleges, however, per se defamatory statements because the e-mail accuses Sondesky of a crime—stealing money. *See Diah-Kpodo v. Wawa, Inc.*, No. 1100 EDA 2015, 2016 WL 732767, at \*4-5 (Pa. Super. Ct. Feb. 24, 2016). Thus, Ellis’ argument is unsuccessful.

Ellis next argues that the defamation claim fails because the statements in the e-mail were conditionally privileged. To succeed on a defense of conditional privilege, a defendant must first

- With respect to Count III, Defendant's Motion is **GRANTED**.<sup>2</sup>

Plaintiff has requested leave to amend her Complaint to cure any deficiencies. Plaintiff may amend her Complaint **on or before February 9, 2018**.

s/Anita B. Brody

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ANITA B. BRODY, J.

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show that the communications were “made on a proper occasion, from a proper motive, in a proper manner, and which are based upon reasonable cause.” *Moore v. Cobb-Nettleton*, 889 A.2d 1262, 1268 (Pa. Super. Ct. 2005) (citing *Miketic v. Baron*, 675 A.2d 324, 329 (Pa. Super. Ct. 1996)). Then, once conditional privilege is established, the burden shifts to the plaintiff to show whether the conditional privilege does not apply because it was abused. *Id.* at 1269. Conditional privilege can be abused if the publication is done with malice. *Id.* Whether a conditional privilege has been abused is a question of fact for the jury. *Miketic*, 675 A.2d at 327 (citations omitted).

Here, even if the statements by Ellis were conditionally privileged, Sondesky has alleged abuse of that privilege. *See* Compl. ¶ 33 (“Defendant’s conduct shows actual malice on his part.”). Therefore, a ruling on this issue is inappropriate at the motion to dismiss stage because a finding that privilege protects Ellis would require resolution of factual issues.

<sup>2</sup> For Count III, Sondesky alleges Intentional Infliction of Emotional Distress (IIED). In order to properly allege IIED, a plaintiff must allege physical injury. *See Harris v. Saint Joseph's Univ.*, No. CIV.A. 13-3937, 2014 WL 1910242, at \*12 (E.D. Pa. May 13, 2014) (citing *Hart v. O'Malley*, 647 A.2d 542, 554 (Pa. Super. Ct. 1994), *aff'd*, 676 A.2d 222 (Pa. 1996)). Here, Sondesky fails to allege physical injury, and therefore, fails to allege IIED.